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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2028

THE JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA., THOMAS S. RITTENHOUSE, BEVERLY LYNN BENSON, MARGARET M. HIPPLE, ROBERTA M. SCHNEIDER,

Petitioners,

—v.—

THE UNITED STATES JAYCEES, THE UNITED STATES JAYCEES FOUNDATION, THE JAYCEES MENTAL HEALTH AND MENTAL RETARDATION FUND, THE JAYCEES WAR MEMORIAL FUND, GEORGE P. SHULTZ, as Secretary of the Treasury of the United States, DON ALEXANDER, as Commissioner of Internal Revenue, HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity, JAMES LYNN, as Secretary of the Department of Housing and Urban Development, PETER J. BRENNAN, as Secretary of the Department of Labor, WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THE UNITED STATES JAYCEES, THE UNITED STATES JAYCEES FOUNDATION, THE JAYCEES MENTAL HEALTH AND MENTAL RETARDATION FUND, THE JAYCEES WAR MEMORIAL FUND, GEORGE P. SHULTZ, as Secretary of the Treasury of the United States, DON ALEXANDER, as Commissioner of Internal Revenue, HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity, JAMES LYNN, as Secretary of the Department of Housing and Urban Development, PETER J. BRENNAN, as Secretary of the Department of Labor, WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, The Junior Chamber of Commerce of Philadelphia, Pa., Thomas S. Rittenhouse, Beverly Lynn Benson, Margaret M. Hipple and Roberta M. Schneider, pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the Tenth Circuit entered on April 16, 1974.

Opinions Below

The opinion of the Court of Appeals for the Tenth Circuit affirming the judgment of dismissal rendered by the United States District Court for the Northern District of Oklahoma has not yet been reported; it is set out in the Appendix, *infra*, at pp. 1a-15a. The opinion of the United States District Court for the Northern District of Oklahoma is unreported, it is set out in the Appendix, *infra*, at pp. 17a-21a.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 16, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Does the arbitrary exclusion of women from membership in a national civic organization which receives major federal contracts, grants and tax exemptions, and which administers federal health and welfare programs in order to provide leadership training for its members, constitute discriminatory "government action" prohibited by the fifth amendment?

2. May federal agencies award major contracts, grants and tax exemptions to a national civic organization which provides leadership training opportunities for its members but arbitrarily excludes women from membership?

Statement of the Case

Respondent The United States Jaycees [Jaycees] is a national civic organization designed and operated to provide leadership training for young men through participation in community service activities. Membership is open to all males between the ages of 18 and 36 of good moral character. Females are barred from membership regardless of their qualifications. The United States Jaycees is an umbrella organization with numerous affiliated state and local chapters, all of them required to abide by national bylaws that exclude women from membership. The Jaycees and its related foundations receive substantial funding from federal agency grants and contracts and enjoy tax exempt status under 26 U.S.C. §§501(c)(3) and 501(c)(4). The federal contracts and grants, awarded by the Office of Economic Opportunity, Department of Housing and Urban Development, Department of Labor, and Environmental Protection Agency, provide the Jaycees with community service program which its members administer, promote and implement in partnership with these federal agencies in order to obtain experience that will assist them in obtaining and performing executive positions.[1]

In the past several years, various Jaycee chapters have questioned (either on their own or because of community pressure, inquiries by state officials charged with enforce-

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[1] The programs cover an enormous range of civic activity, *e.g.*, prevention of alcohol abuse, control of venereal disease, prevention of child abuse, environmental education, a criminal justice program, programs for low cost housing and transportation for the elderly. With respect to some of these programs, Congress has stipulated expressly that "to the maximum extent feasible," [programs] contribute to the "elimination of artificial barriers to employment and occupational advancement." 42 U.S.C. §2769c(c).

ment of antidiscrimination laws, threats of litigation by females who desire membership) the propriety and legality of excluding women from membership. As a result, a number of chapters have admitted women.

The first chapter to admit women was the Junior Chamber of Commerce of Rochester, New York [Rochester]. Because it admitted women, Rochester was expelled from the national organization in April, 1972, and warned against using the name "Jaycees." In October, 1972, Rochester and several of its members commenced an action against The United States Jaycees and its affiliated foundations (the other Jaycee respondents) as well as the federal agencies (hereinafter government respondents) which award contracts, grants and tax exemptions to The United States Jaycees and its affiliated foundations. The action was instituted in the United States District Court for the District of Columbia, but on the motion of the Jaycees was transferred to the Northern District of Oklahoma.

The complaint sought *inter alia* an injunction prohibiting The United States Jaycees from excluding women from membership and restoration of Rochester's status as part of The United States Jaycees or, in the alternative, an injunction prohibiting the federal agencies from awarding contracts, grants or tax exemptions to The United States Jaycees so long as they exclude women from membership.

In July, 1972, the Philadelphia Junior Chamber of Commerce [Philadelphia] admitted women to membership and was threatened with expulsion from the national organization by June 14, 1973, unless it conformed to the discriminatory bylaw. Philadelphia and several of its members sought permission to become additional plaintiffs in the

Rochester action. Permission was granted with the consent of the respondents. Further, again with the consent of The United States Jaycees, an injunction was entered prohibiting The United States Jaycees from expelling Philadelphia pending the district court's ruling on the government defendants' motion to dismiss the complaint for failure to state a claim against them.

The primary thrust of the government defendants' motion to dismiss was the alleged absence of any nexus between the discriminatory policy of the Jaycees and government assistance. It was evident, however, and the Tenth Circuit so declared, that The United States Jaycees receive and administer "substantial grants on behalf of the government."

On June 26, 1973, in a two page opinion, Judge Bohanon of the Northern District of Oklahoma dismissed the entire case as to *all* respondents, without affording plaintiffs the opportunity for complete discovery and trial. Although it was beyond debate that the Jaycees practiced sex discrimination in its most blatant and obnoxious form, and equally beyond debate that the Jaycees "administer substantial grants on behalf of the government," the district judge ruled that "the federal question was insubstantial."

On June 26, 1973, without notice, the Jaycees expelled Philadelphia from the national organization. On June 28, 1973, all plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. Philadelphia sought an order staying its expulsion from the national organization, but its request was denied by the Tenth Circuit.

On April 16, 1974, the Tenth Circuit affirmed the judgment of the district court. It declared that, despite the

substantial extent to which the Jaycees operate on government funds, the Jaycees' discriminatory membership policy does not constitute "government action" subject to fifth amendment scrutiny. Further, it declared that the government defendants did not violate the fifth amendment equal protection principle because federal assistance granted the Jaycees was not connected to the "males only" membership rule maintained by the Jaycees. In reaching its determination, the Tenth Circuit considered dispositive this Court's decisions in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), and *Walz* v. *Tax Commissioner*, 397 U.S. 664 (1970). Focusing almost exclusively on tax exemptions granted the Jaycees, the Tenth Circuit's legal analysis virtually ignores the extensive allegations of the complaint and proof submitted at the evidentiary hearing establishing constant government support of and close relationship to the Jaycees through federal contract and grant programs.[2]

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[2] This deficiency in the Tenth Circuit opinion was noted by a federal court that decided the identical question against the Jaycees. *The New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, S.D.N.Y. No. 74 Civ. 652 at n. 34 (June 13, 1974), opinion set out in the Appendix, *infra*, pp. 22a-46a. A notice of appeal to the Second Circuit was filed by the United States Jaycees on June 28, 1974.

REASONS FOR GRANTING THE WRIT

The decision of the court below raises a substantial issue as to the scope of the Constitution's equal protection guarantee. It threatens shrinkage of the "state (government) action" concept to the point where women will be denied meaningful constitutional protection against officially sanctioned discrimination. And it augurs a chaotic state of affairs in the lower courts unless this Court provides prompt and clear guidance. The determination that a civic organization with an established policy of invidious sex discrimination may engage in the performance of programs on behalf of the government and train its members on government grants is inconsistent with decisions of this Court and in square conflict with decisions of other lower federal courts. Because of the national character of the Jaycees, the question is likely to be presented in various courts, generating unnecessary waste of judicial resources and compounding the existing uncertainty. Indeed, after the Tenth Circuit's decision, a district court in the Second Circuit considered the identical issue, found "state (government) action," and issued a preliminary injunction prohibiting the expulsion of The New York City Jaycees.[3] Thus, women's access to the federally financed training and advancement opportunities Jaycee membership affords depends on the federal district in which they happen to reside. This unfair and unseemly situation merits immediate resolution by this Court.

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[3] *The New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, S.D.N.Y. June 13, 1974, set out in the Appendix, *infra*.

1. The decision below is inconsistent with decisions of this Court condemning discrimination facilitated, promoted or supported by government assistance.

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); and *Gilmore* v. *City of Montgomery*, 42 U.S.L.W. 4920 (June 17, 1974), this Court held that discrimination ceases to be a "private" activity when it is supported, encouraged or significantly assisted by government actions so that it carries connotations of official approval. While provision of generalized or routine government services will not convert private activity to public activity, *Moose Lodge No. 107* v. *Irvis*, *supra*, substantial assistance will when it signals to the public particularized official involvement with the actor.

The court below held that the Jaycees discriminatory membership policy was not subject to constitutional prohibition because there was no causal connection between the Jaycees receipt and administration of substantial government grants, contracts and tax exemptions and its membership policy. It recognized, however, that discrimination by the Jaycees among the ultimate beneficiaries of the federal funds would be constitutionally prohibited. This distinction misconstrues the nature of the Jaycee organization in which members are beneficiaries of the federal funds insofar as these funds provide them with the opportunities for leadership training and supplementary education for employment advancement. Furthermore, it erodes the equal protection clause and the national policy which mandates eradication of arbitrary gender-based barriers.

In *Norwood* v. *Harrison*, *supra*, this Court instructed that different degrees of government involvement consti-

tute "state action" for different constitutional purposes and that substantial assistance to an *institution* which has an established policy of discrimination is unlawful affirmative support of that policy. And in *Moose Lodge No. 107, supra,* the Court emphasized that Pennsylvania did not benefit from the lodge as Delaware benefited from the restaurant in *Burton* v. *Wilmington Parking Authority, supra.* The Tenth Circuit, however, woodenly applied a "nexus" test which it had developed in a procedural due process context (*Ward* v. *St. Anthony Hospital,* 476 F.2d 671 (1973)), and did not advert to the benefit derived by the government through Jaycees administration of public health and welfare programs, the benefits derived by the members or the benefit to the institution itself.

Moreover, the Tenth Circuit's expansive reading of *Walz* v. *Tax Commissioner, supra,* is an egregious distortion of this Court's position on "state action." *Walz* sanctioned a real property tax exemption for all associations organized exclusively for religious purposes; it is hardly relevant precedent for massive government funding of a civic organization that categorically discriminates on the basis of a birth characteristic unrelated to ability to perform or to contribute to the community.

The Tenth Circuit interpretation of *Moose Lodge* and *Walz* can only succeed in encouraging constitutionally prohibited discrimination. The decision permits an organization to receive unlimited financial assistance—contract grants and tax exemptions—although it engages in invidious discrimination in its membership and compels chapters to do the same as a condition of sharing these benefits. It permits government agencies to provide unlimited grants and contracts to any organization regardless of its estab-

lished policy of invidious discrimination. In short, the unprecedented holdings of the courts below severely undermine the constitutional prohibition against government supported discrimination. Under the peculiar logic of the Tenth Circuit's opinion, the state or federal government could provide unlimited funds to schools, hospitals or other institutions that discriminate in designating teachers, doctors, and others to administer the funds, so long as they do not discriminate among students, patients or other beneficiaries.

2. This case presents a vital test of the extent to which women are beneficiaries of the equal protection guarantee.

Exclusion of women from participation as equals in a national civic organization styling itself a "supplementary educational institution" designed to provide advancement opportunities is invidious discrimination of the kind described by this Court in *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). The failure of the Tenth Circuit to apply to sex discrimination the tests of "state action" developed by this Court in race discrimination cases threatens an inferior brand of constitutional protection for women's rights to equal opportunity. The question whether a national civic organization may maintain a policy of sex discrimination when it receives substantial federal funds must be resolved by this Court to prevent the application of disparate standards by lower courts depending upon whether the issue is sex discrimination or race discrimination.

3. Unless resolved by this Court, the issue in this case will be the subject of prolific litigation productive of conflicting constitutional interpretations.

Because the United States Jaycees is a national organization with local chapters throughout the country, several of which have already admitted women, the constitutionality of the Jaycees bylaw is bound to be litigated in various courts. There is currently a conflict between the result in this case involving Rochester and Philadelphia and the result in litigation commenced by The New York City Jaycees, *The New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, S.D.N.Y. June 13, 1974, set out in the Appendix, *infra*. Unless this Court resolves the issue, other Jaycee chapters will be faced with an untoward dilemma as to the constitutionality of their action in admitting or excluding women. They will be confronted with the threat of expulsion by the Jaycees if they admit women, and the threat of litigation by women or adverse action by state officials charged with administration of antidiscrimination laws if they do not. The constitutionality of the membership policy of a particular chapter should not depend upon its location or the composition of the forum invoked by one side or the other to resolve the dispute.

4. The Tenth Circuit's restrictive interpretation of "state action" in discrimination cases is in conflict with the clear decisional trend in the lower courts.

The decision of the court below is the first and only decision holding that a private organization may practice invidious discrimination while receiving substantial federal grants and contracts. In reaching this result the Tenth

Circuit applied a test of "state action" in square conflict with the test used by the Second Circuit, most recently in *Jackson* v. *The Statler Foundation*, —— F.2d ——, Slip Opinion No. 46 (April 5, 1974), and by several three judge courts. *McGlotten* v. *Connally*, 338 F. Supp. 448, 452 (D.D.C. 1972); *Falkenstein* v. *Dept. of Revenue*, 350 F. Supp. 887, 888 (D. Ore. 1972), appeal dismissed, 409 U.S. 1099 (1973); *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971) (three judge court), aff'd sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971). Accord, *Male* v. *Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972); *Stern* v. *Massachusetts Indemnity & Life Ins. Co.*, 365 F. Supp. 433 (E.D. Pa. 1973); *Golden* v. *Biscayne Bay Yacht Club*, 370 F. Supp. 1038 (S.D. Fla. 1973); *Keller* v. *Kate Maremount Foundation*, 365 F. Supp. 798 (N.D. Calif. 1972).

As these decisions indicate, there is a vast difference between government assistance, such as police and fire protection, routinely provided to all without any connotation of approval, and government provision of financial resources necessary to sustain an organization's operational programs. Choice of the Jaycees to perform federal contracts and receive federal grants, and the Jaycee's substantial dependence on government funding, surely signal to the public government approval and encouragement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1974

Opinion of the Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1560

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., Rochester, New York, et al., Plaintiffs-Appellants, v. THE UNITED STATES JAYCEES, Tulsa, Oklahoma, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 73-C-66)

Judith R. Cohn of Wolf, Block, Schorr and Solis-Cohen, 12th Floor, Packard Building, Philadelphia, Pennsylvania (E. Gerald Riesenbach of Wolf, Block, Schorr and Solis-Cohen, on the brief), for Appellants Junior Chamber of Commerce of Philadelphia, Pennsylvania, Thomas S. Rittenhouse, Beverly Lynn Benson, Margaret M. Hipple and Roberta M. Schneider; Emmelyn Logan-Baldwin, 19 Arnold Park, Rochester, New York for Appellants Junior Chamber of Commerce of Rochester, Inc., Janis Gaines, Jane Selman, Charles Wetmore, James T. Bruen, David Heiligman, Thomas Banaszewski and Sydnee Schwartz; Debra A. Millenson, 1800 G Street, N.W., Washington, D.C., for Appellant Joann Clevenger; Josephine L. Citrin, 15 Cobbert Road, Portland, Maine, for Appellant Joan H. Clyne; S. Chandler Visher and James Hautzinger of Dawson, Nagel, Sherman & Howard, 1900 First National Bank Building, Denver, Colorado, local counsel to all Appellants.

Robert J. Corber, 1250 Connecticut Avenue, N.W., Washington, D.C. (Gary Taylor, 2301 First National Bank Building, Denver, Colorado, and Ronald S. Cooper and Kenneth I. Jonson II, 1250 Connecticut Avenue, N.W., Washington, D.C., Of Counsel, on the brief), for the private Appellees.

Ann Belanger, Attorney, Tax Division, Department of Justice, Washington, D. C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks and Jonathan S. Cohen, Attorneys, Tax Division, Department of Justice, Washington, D.C. and Nathan G. Graham, United States Attorney, Of Counsel, on the brief), for the federal Appellees.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a sex discrimination case. Appellants seek review of a judgment of dismissal of the United States District Court for the Northern District of Oklahoma. The claim of the appellants in the District Court was that the United States Jaycees unconstitutionally excluded the Junior Chamber of Commerce of Rochester, New York and the individual appellants from affiliation and membership in the United States Jaycees. Similar claims are asserted by the Junior Chamber of Commerce of Philadelphia and of New Orleans, Louisiana, and individual members of those organizations. Appellants also asserted in District Court that certain named federal officers impermissibly support the United States Jaycees and various state and local Jaycee chapters by allowing them tax exemptions and by utilizing them to implement federal grants and programs.

The controversy was the result of the United States Jaycees' bylaws limiting membership to males. On this account the Junior

Chamber of Commerce of Rochester was expelled from the United States Jaycees because it had chosen to admit women as members. Individual members of the Rochester Jaycees were then prevented from becoming affiliated with the United States Jaycees and thereby lost certain opportunities to take part in the charitable work of the United States Jaycees, part of which involved the transmission of federal funds to the needy. Appellants allege that the United States Jaycees are violating the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. § 1983, by prohibiting women from becoming members of the United States Jaycees and any state or local Jaycees organization.[1]

Various federal statutes, including the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, are relied on to gain admittance to federal court for the purpose of asserting the alleged violation. According to the allegations of the amended complaint, the Jaycees and various state chapters thereof received substantial tax benefits under §§ 501(c)(3) and (c)(4) of the Internal Revenue Act and also various federal grants and contracts from OEO and other departments of the United States Government. It is alleged that the various Jaycee organizations use federal funds to sponsor HEW programs, including construction of housing projects and assistance to underprivileged children.

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1. Why the defendant Jaycees would so adamantly oppose members of the feminine sex in its organization is most difficult to understand. It may well be that they fear the competition. They may indeed be concerned as to the known propensity of members of the feminine sex to devote themselves to causes such as this. We are not, however, permitted to pursue this inquiry--our mission being to ascertain whether the action complained of is sufficiently governmental to justify the federal courts' entertaining and taking cognizance of the claims.

From all of this, it is the position of plaintiffs that the United States Jaycees is in practical effect an arm of the government and that therefore when it discriminates in its membership policies it is acting officially. On this basis appellants claim that their rights are subject to the protection of the Fifth and the Fourteenth Amendments to the Constitution of the United States and are violated by the Jaycees' exclusionary membership policies.

The plaintiffs do not contend that they have any direct pecuniary interest in the funds which have been mentioned. An evidentiary hearing held by the District Court revealed that the United States Jaycees administer substantial grants on behalf of the government. A memorandum admitted into evidence showed that government funds distributed by the United States Jaycees amounted to approximately $985,000. However, the rights which the plaintiffs say were invaded were not monetary. Rather, they contend that they were deprived of leadership training and administrative experience.

The District Court ruled that the complaint failed to state a claim because the federal question was insubstantial. The court there noted that the plaintiffs had failed to allege any direct relationship between the discrimination against the plaintiffs and the distribution of government funds.

In support of their contentions that the discrimination is of constitutional dimension, the plaintiffs cite cases recognizing the invalidity of discrimination both in educational areas and in employment. See Frontiero v. Richardson, ____U.S.____, 93 S.Ct. 1764 (1973). In Frontiero there was a federal statute which differentiated between housing and medical benefits available to married male and female members of the armed forces.

The Supreme Court condemned this as unconstitutional, citing Reed v. Reed, 404 U.S. 71 (1971). Four members of the court held that classifications based upon sex were to be considered suspect. This shifted the burden to the government to establish the validity of such classifications and gave rise to the necessity for strict judicial scrutiny. In Reed the Supreme Court had ruled that an Idaho statute giving preference to males over females as administrators of estates was an unconstitutional violation of the equal protection clause.

There is no dispute about the invalidity of discrimination by the state or federal government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex. Therefore, the only issue is whether the discrimination can by reason of the circumstances present, be considered official (state or federal) action. It must also be conceded that private discrimination does not give rise to a constitutional violation. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

The Supreme Court had held that entities which are ordinarily private but which perform governmental services cannot discriminate in carrying out their functions. Such agencies are subject to constitutional prohibitions. See, for example, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

I.

We proceed to consider whether the plaintiffs have established a case under the Constitution and laws of the United States including 28 U.S.C. § 1331, which implements the "arising under" clause of Article III of the Constitution and authorizes suits arising under the Constitution and laws of the United States in which the amount in controversy exceeds $10,000.

The District Court did not dismiss the cause for lack of jurisdiction. It correctly entertained the action and then dismissed it because of plaintiffs' failure to show a substantial federal question.

In Bell v. Hood, 327 U.S. 678 (1946), a suit against agents of the FBI seeking damages for violations of the Fourth and Fifth Amendments, it was alleged that there were unconstitutional arrests, searches and seizures. The district court and the court of appeals dismissed for want of jurisdiction. However, the Supreme Court reversed these holdings, stating that the court must assume jurisdiction in order to decide whether the allegation stated a cause of action on which the court could grant relief as well as to determine the issues of fact arising in the controversy. According to the Supreme Court, jurisdiction is not defeated by the possibility that the complaint does not state a claim for relief. This is a question of law which must be decided by the court after the parties have advanced beyond the threshold of the court. The Supreme Court concluded in Bell v. Hood that a federal court has jurisdiction to entertain an action under 28 U.S.C. § 1331 if the complaint asserts a reasonable claim seeking recovery directly under the Constitution or laws of the United States. Under the two exceptions to this rule, a suit may be dismissed for lack of jurisdiction only where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. 327 U.S. at 682.

Subsequently, in Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 388 (1971), the Court went much further in delineating the scope of federal court jurisdiction arising under the Constitution and laws of the United States.

The Bivens Court proceeded to carve out a damage remedy in federal civil rights actions based on violation of the Fourth Amendment. This approach is in accord with Gully v. First Nat. Bank in Meridian, 299 U.S. 109 (1936) and Smith v. Kansas City Title & Trust Co., 255 U.S. 180 at 199-200 (1921).

The Wright edition of Barron and Holtzoff, Vol. 1 at pp. 122-23, points out that whether there is a claim presenting a federal question and whether that claim is well founded when considered on its merits are two separate and distinct questions. The author goes on to say:

> However, the [federal] question must be substantial and not frivolous or a mere matter of form. A claim is not substantial if it is obviously without merit, or foreclosed by prior authoritative decisions. A proposition settled by the Supreme Court no longer presents a federal question for jurisdictional purposes. At the same time, a claim properly based on federal law raises a federal question even though all parties may agree as to the legal principles involved and disagree only as to the facts of the particular case.

It is difficult to apply jurisdictional principles to the instant case, which is somewhat of a borderline situation in which the facts are of minimal assistance. In the final analysis the plaintiffs demand an enormous amount, that is, injunctive relief against high officials of the United States, which relief would interfere with the administration of the tax laws affecting the allowance of tax exemptions. Plaintiffs make these extreme demands even though the tax benefits extended are not directly related to the discrimination complained of. Thus it comes close to a situation in which there is at least some temptation to ground the decision on lack of jurisdiction.

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Since, however, it is more a matter of form and procedure to dism the cause out of hand, we choose to accept jurisdiction and then to consider whether plaintiffs present a meritorious claim under the Constitution and laws of the United States.

The dichotomy between the jurisdictional question and the question of considering the claim on the merits is far from clear in the instant case. However, in view of the fact that the plaintiffs offered evidence to show that the various statutes were applied in an unconstitutional way, it appears to us that the cause is not one in which there is a palpable deficiency in the area of jurisdiction. Accordingly, we determine whether there is a sufficient federal claim upon which relief can be granted.

II.

The first question is whether there is a violation of 42 U.S.C. § 1983 which gives a remedy to persons whose civil rights have been invaded by officers acting under color of state law. Although plaintiffs have invoked this provision, they have not emphasized the official state action approach. Rather, the thrust of their argument is that there has been a violation of their constitutional rights because of the close relationship of the Jaycees with the United States Government. Indeed, they have not set forth either in their amended complaint or in their briefs a clear-cut theory in support of their alleged § 1983 claim. From a search of the record it would appear that the § 1983 claim is predicated on the fact that in some instances, and particularly in connection with the Rochester Jaycees, federal funds have been awarded by the United States to state agencies, which in turn have made grants to the local Jaycees chapter for use in activities sponsored by the Jaycees, such as drug abuse and minority betterment programs.

We fail to see that there is present the essential state action. It is one thing to say that the private organization has state character where it induces, encourages or promotes private persons to accomplish what it is constitutionally forbidden to accomplish. Norwood v. Harrison, 413 U.S. 455 (1973). We do not have such encouragement or promotion here. The Constitution applies if the private action complained of is in essence the action of the government. Burton v. Wilmington Parking Authority, supra. The plaintiffs would have us rule that because the Jaycees are used by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a § 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree.

Our court has adopted a more restricted view of what is state action on at least two occasions. In Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973), it ruled that a hospital which had received some governmental funding as a small percentage (5%) of its total construction funds was not subject to civil rights actions against its hospital board even though the operation of the hospital was extensively regulated by the state. It was stressed that the acts complained of did not thereby serve to clothe the hospital with sufficient state authority so as to constitute state action. The opinion by Judge Hill also emphasized that the facts failed to establish that the State of Colorado had any part in the alleged deprivation. It was said that the regulation by the state existed only in order to assure quality medical services. Thus, none of the evidentiary matters there presented deprived the hospital of its private status or involved the state in the

alleged violations of the Federal Constitution. Cf. the Civil Rights Cases, 109 U.S. 3 (1883).

Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) also held that unrelated and collateral discriminatory policies of private organizations do not furnish the state action necessary to a civil rights suit. The plaintiffs in Browns sought to establish that the University of Denver, a private institution, had state character and was subject to the Constitution and laws of the United States because of a substantial state tax exemption which extended to property operated for profit. In rejecting this, the lack of connection between the tax exemption and the conduct complained of was emphasized.

The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement essential to a civil rights action under § 1983.

III.

There are very few cases involving federal action as distinguished from state action, but similar distinctions between acts of the government subject to constitutional limitati and private actions to which the Constitution does not apply obtain. Thus, the state action cases in which the Supreme Court has enunciated the applicable legal criteria must be considered, and generally the rule which has been adopted as to the state action (that the state itself must have some connection with the discrimination) would apply.

In Burton v. Wilmington Parking Authority, supra, the Supreme Court condemned discrimination by a restaurant-lessee of a Delaware parking garage or authority, saying that its refusal to serve a black patron constituted state action. Similarly, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), a black patron, who was a guest of a member of the Moose Lodge, was refused service at the club's dining room and bar solely because of his race. The lower court found that the lodge's membership and guest practices were discriminatory and constituted state action. It declared the state liquor license invalid as long as the club's practices were continued. The Supreme Court adopted a narrower view, holding first that the plaintiff-appellee lacked standing to challenge the membership practices of the Moose Lodge, although he did have standing to litigate the validity of the refusal of the lodge to serve him. The Supreme Court then held that Pennsylvania's regulation of liquor traffic was not sufficient to implicate Pennsylvania in the discriminatory guest practices which were employed by the Moose Lodge. The Court further determined that there was no evidence in the record that the regulation of the sale of liquor was intended "overtly or covertly to encourage discrimination." We have concluded from this decision that there must be a sufficient nexus between the discrimination and the alleged state action in order to render the activity a constitutional violation.

An even more persuasive analogy is found in Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970). Here a real estate owner sought to enjoin the Tax Commission from granting exemptions to religious organizations for properties used solely for religious worship. The Supreme Court held that the New York state statute exempting from real property tax an association organized exclusively for religious purposes was not unconstitutional in that it did not itself attempt to establish,

sponsor or support religion. The Supreme Court said that the religious clause of the First Amendment does not require absol abstention by the state from extending any aid to religious organizations. The state may therefore determine that entitie which foster moral or mental improvement are not to be inhibit in their activities by ad valorem taxes or the hazard of loss of their properties for non-payment. By so doing, the Court reasoned, the government is not thereby sponsoring religion. It is a less direct subsidy than a cash support. Therefore, the Supreme Court reasoned, when the government grants an exemption which does not actually involve the state with the activities of the beneficiary, "there is no genuine nexus between tax exemptions and establishment of religion."

In the case at bar the exemption granted to the United States Jaycees would be even less subject to constitutional attack than would an exemption granted to a church, for in the latter case (the Walz case) the proscriptions of the First Amendment expressly require the separation of church and state

We do not say that the relationship between the United States and the United States Jaycees is so remote that the actions of the Jaycees could never be attributed to the government. If, for example, the Jaycees administered the government's funds in a discriminatory manner, a remedy for constitutional violation might well obtain. In our case, however, the question is whether the United States is obligate to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action.

IV.

This cause presents other problems which are argued in the briefs and to which we will briefly allude. Plaintiffs are seeking injunctions against high government officials first to prevent the making of grants for the use of the deprived and needy and, second, to void the tax exempt status of the United States Jaycees for collateral reasons not set forth in the statutes creating the grants or exemptions. These demands create practical as well as legal problems. Thus, the court is reluctant to interfere with the processes of government and, in effect, to write a tax statute which declares that government officials are obligated to withhold benefits to organizations which are general sinners regardless of whether the sins are committed in the disposition of the government's funds.

One legal obstruction is the doctrine of Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic and Foreign Corp.; 337 U.S. 682 (1949), and Land v. Dollar, 330 U.S. 731 (1947), which say that when government officials are acting in accordance with the dictates and mandates of the law they are not subject to suit, that is, the suit is, in effect, against the government and the doctrine of sovereign immunity comes into play. Such suits also conflict with the prohibition against interfering with the taxing process. See the Anti-Injunction Act, 26 U.S.C. § 7421; Enochs v. Williams Packing Co., 370 U.S. 1 (1962); State Railroad Tax Cases, 92 U.S. 575 (1875). See also 28 U.S.C. § 2201, Declaratory Judgment Act.

The Larson Court recognized two exceptions to the sovereign immunity doctrine which it had applied. First, the case in which the officer is acting beyond the law and, secondly, the situation in which he is acting unconstitutionally. The Court

said in Larson that neither exception applied and that the granting of relief would be tantamount to an unconsented judgment against the government.

The decision of the Supreme Court in Land v. Dollar, 330 U.S. 731 (1947), an action against members of the Maritime Commission to recover shares of stock delivered to the Commission as a pledge to secure a loan to the plaintiff's corporation, followed the basic doctrine later enunciated in Larson. In Land v. Dollar, supra, the Supreme Court recognized the right of the district court to entertain the suit because potentially at least it involved invalid retention of private property.

Dugan v. Rank, 372 U.S. 609 (1963) sought an injunction against reclamation officers to prevent impounding water behind a dam. Here the Court said that neither of the exceptions noted in Larson were present.

In our case there is neither an unconstitutional act on the part of the officers involved nor an action beyond the scope of the authority granted. Accordingly, no basis is shown for departing from the Larson doctrine.[2]

Finally, then, plaintiffs make tremendous and disproportionate demands which are beyond the realm in which the court can grant relief.

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2. Furthermore, we regard the District Court as having correctly decided that plaintiffs' constitutional challenge to several federal statutes is too insubstantial to require convocation of a three-judge district court under 28 U.S.C. § 2282.

For the reasons stated, the action of the District Court dismissing the cause was correct and the same is hereby approved. The judgment of the District Court is affirmed.

United States Court of Appeals
TENTH CIRCUIT
OFFICE OF THE CLERK
DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

TELEPH
303-837-

April 29, 1974

TO: ALL COUNSEL

RE: NO. 73-1560, Junior Chamber of Commerce, etc., et al. v. United States Jaycees, et al.

Dear Counsel:

By letter dated April 12, 1974, this office forwarded the opinion in the captioned case.

This was a typographical error in stating that the Judgment in accordance with the opinion was entered as of that date. The correct date should have been April 16, 1974, which is the date of the filing of the opinion.

Yours very truly,

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

amc
cc: All Counsel and Interested Parties

Opinion of the United States District Court for the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
No. 73-C-66

ORDER OF DISMISSAL

This cause was originally filed in the United States District Court for the District of Columbia and was transferred to the Northern District of Oklahoma for trial and disposition.

The plaintiff, Junior Chamber of Commerce of Rochester, Inc., New York, amended its bylaws so as to permit females to join the organization, and the individual plaintiffs are such females who did actually join the Rochester chapter.

On February 18, 1972, the defendant United States Jaycees notified Rochester Jaycees that because of the Rochester Jaycees admitting women, the United States Jaycees were suspending Rochester Jaycees from all rights, privileges and benefits accorded the Chapter, and thereafter on March 25, 1972, the administrative arm of the United States Jaycees, New York State Jaycees, Inc., formally expelled Rochester Jaycees from membership because of admission of women.

Plaintiffs seek a declaration that the

laws of the United States forbid the furnishing of financial support to the Jaycee defendants organizations which exclude females from membership and seek a permanent injunction restraining the United States Government and Secretaries of the Departments named in the Complaint as defendants from granting or continuing to grant federal support in the form of tax benefits, federal contracts and federal or governmental monetary grants and assistance, and specifically seek an Order requiring the Jaycee defendants to restore plaintiff Junior Chamber of Commerce of Rochester, Inc., to full rights and privileges as an affiliate. Plaintiffs allege and claim that specific tax exemption not enjoyed by other corporations constitutes a state action taken "under color of state law" within the meaning of the Civil Rights Act, 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

It is not alleged nor claimed by the plaintiffs that discrimination of any sort, sex, color or otherwise is employed by the Jaycee organizations in the performance of their services for public or in the sponsoring of any public service projects, and it is not claimed that any of the funds granted or allowed to the Jaycees for sponsoring these specific projects is used in anywise to promote any type of discrimination.

George P. Shultz, as Secretary of the Treasury of the United States, and the six other named United States Government officials and their departments have filed Motion to Dismiss this case upon the grounds:

1. The case is, in substance, an unconsented suit against the United States, and as such, its maintenance is barred by the Doctrine of Sovereign Immunity, and

2. The Complaint fails to state a claim upon which relief may be granted.

The remaining defendants, The United States Jaycees, Tulsa, Oklahoma, and the other named defendants, moved in their Answer to Dismiss this action for failure to state a claim upon which relief may be granted.

The record clearly shows that the Jaycee defendants are all and each of them non-profitable organizations.

The national Jaycee organization and all of its official chapters located in the various cities of the United States were organized for such educational purposes and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organizations a spirit of genuine Americanism and civic spirit and interest, and its membership is limited to young men only.

The Court concludes that this is not a proper class action and not superior to other more appropriate and proper methods of adjudication. See Opinion of Judge A. Sherman in Christensen in Marie Wilcox, et al. v. Commerce Bank of Kansas City, a corporation, (10 C.A. Opinion filed United States Court of Appeals, Tenth Circuit, February 20, 1973).

From a study of the pleadings and the entire file in this case, there appears to be no substantial constitutional question involved. In fact, it appears that the constitutional issue alleged in the Complaint is totally lacking in substance, and, therefore, the Court concludes that this is not a proper case for statutory three-judge court consideration and treatment.

Upon due consideration of all the pleadings filed in this case, testimony, affidavits, briefs, the argument of counsel and the admitted facts, the Court is of the opinion that the Motion of George P. Shultz and the other six named government defendants to dismiss should be sustained.

It is the further judgment and opinion of the Court that the Motion to Dismiss for failure to state a claim against the remaining defendants should be sustained, and

It is the further judgment and opinion of the Court that all intervening complainants herein, who have intervened by agreement of the parties, have failed to state a claim

against the defendants and that the Intervening Complaints should be dismissed.

IT IS, THEREFORE, ORDERED that the plaintiffs' action and Intervenors' actions against the defendants and all of them should be and the same are hereby dismissed.

Dated this 26th day of June, 1973.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

The New York City Jaycees, Inc. v. United States Jaycees, Inc., S.D.N.Y. No. 74 Civ. 652 (June 13, 1974). Unreported Opinion

United States District Court
Southern District of New York

THE NEW YORK CITY JAYCEES, INC., Plaintiff, -against- UNITED STATES JAYCEES, INC. and NEW YORK STATE JAYCEES, INC., Defendants.	74 Civ. 652 (MIG)

GURFEIN, D.J.:

The New York City Jaycees, Inc. ("Local") sues to enjoin the United States Jaycees, Inc. ("National") and the New York State Jaycees, Inc. ("State") from revoking the charter of the plaintiff.

The plaintiff has a charter granted by the national body. The by-laws of National provide that active membership is limited to young men between the ages of 18 and 36 of good moral character. It has been interpreted to exclude otherwise qualified female applicants.

Local had the same by-law and the same interpretation. On May 18, 1971 a proposal

was made that the by-law be amended to strike the word "men" and to substitute the word "people." This was passed by the membership on May 31, 1973.1/

In June, some women paid their dues and were admitted to the local chapter, and in August the dues were remitted to National by Local. In October, National notified Local that the dues would not be accepted without written verification that all members were male. Thereafter National took the dues but listed the women as "associates."

On October 10, 1973 the plaintiff received a notice that it was in violation of the by-laws of the defendant National which prohibited active membership for women. The plaintiff was ordered to show cause at the Executive Board of Directors meeting on February 16, 1974 why the plaintiff's charter should not be revoked. On February 11, 1974 this Court issued a temporary restraining order to prevent revocation of the charter.

A motion was made for a preliminary injunction and adjourned by consent. In the meantime, National proceeded to revoke the

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1/ Before it amended its by-laws, Local was advised by the New York Attorney General that he would construe failure to do so as a violation of N.Y. Executive Law §296.6.

charter of Local but suspended the effectiveness of the revocation pending the determination of this action.2/

The defendant National moved to quash service of the summons and complaint upon the ground that the Court lacked jurisdiction over its person. Rule 12(b)(2), Fed. R. Civ. P. Decision on this motion was reserved.

An evidentiary hearing was held on April 9, 1974 on the motion for a preliminary injunction.

I

The Facts Found

The plaintiff is incorporated in New York; the defendant National3/ in Missouri. National's headquarters are located in Tulsa, Oklahoma.4/ National began in 1915 in St. Louis as the Young Men's Progressive Civic Association. In 1920 the organization became the Junior Chamber of Commerce. In 1965 it

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2/ Ex. B to Supplemental Warfield Affd.

3/ State is not an active defendant. When defendant is mentioned without further identification, it means National.

4/ Roper Tr. 47-48.

changed its name to the United States Jaycees, Inc. Currently there are 6,500 local chapters in each of the 50 states and the District of Columbia with membership lists running approximately 325,000 in number. There are additionally international affiliates in 82 countries.5/

Local was founded in 1926 under the name Young Men's Board of Trade. In 1948 it was granted a charter by National. Its name was changed in 1965 to New York City Jaycees, Inc. Local has a membership of 114. 6/

The by-laws of National require that Local's by-laws "not contain provisions contrary to [the] by-laws [of the United States Jaycees] or the Constitution of its existing state organizations . . ." Article IV By-Law 4-2. 7/

The National structure consists of a nineteen member executive committee and the presidents of all the states and District of Columbia. This Committee has the responsibility for formulating national policy and by-laws, adopting national programs and annual budgets. There is also a paid staff at the

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5/ Zirk Affd.
6/ Warfield Tr. 14
7/ Roper Affd. 2/27/74 p. 2

national level.8/

National provides services to State organizations and local chapters.9/ Although at one time its purpose was to promote the business interests of its members, in recent years it has broadened its membership, and its program emphasis is on community services. By the defendant's statement it is involved in programs for low cost housing, prevention of child abuse, convict rehabilitation, transportation for the elderly, control of the environment and many other civic activities. The plaintiff alleges, and I so find, that membership in the Jaycees is also still linked to advancement in the business community.

National is affiliated with the United Jaycees Foundation ("the Foundation") which is governed by a self-perpetuating board of seven Trustees. The original trustees at the time of formation of the trust were three in number and they were officers of the defendant. The Board reports annually to National's Board.

The fiscal year ended July 1, 1973 was the first year National received any federal

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8/ Roper Tr. 45.
9/ Roper Tr. 49.

funds. The budget for the year ending July 1, 1974 totals $3,639,000 of which $1,143,000 or 31.4% comes from funds supplied by the Federal Government. Of that amount, $545,085 is received by National directly from the Federal Government, the remaining federal funds coming through the Foundation. $1,200,000 comes from membership dues which are transmitted by mail to National by the State chapters after they have collected them from the locals. The part of the budget not derived from federal funds and dues comes for contributions by corporations and foundations, and the sale of supplies.

The specific federal grants and contracts break down as follows:

(a) National itself is a party to two federal contracts: (1) For the control of venereal disease which was entered into with the Department of Health, Education and Welfare ("HEW") in the amount of $99,923;10/ and (2) for prevention of alcohol abuse, entered into with HEW for $445,162.11/ Of the latter amount, $140,000 is given for "seed" grants to local chapters and state organizations. In 1972-73, the New York State Chapter was awarded a seed grant of $500; and the Greater Pawling Local

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10/ Ex. D.
11/ Ex. E.

received $50.12/

(b) The Foundation is a party to three federal contracts or grants: (1) A $594,000 grant for Project Mainstream, awarded by the Office of Economic Opportunity ("O.E.O.")13/ (2) $21,500 for environmental education, funded to the extent of 19% of the total by HEW;14/ and (3) $325,363 from the Criminal Justice Program which is financed by the Manpower Administration of the Department of Labor. 15/

Project Mainstream is the largest single grant. The purpose of Project Mainstream is to develop successful self-help programs by community action agencies at the local level, 16/ dealing with economic development, community relations housing, elderly assistance, recreation and the like.17/ The New York

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12/ Ex. E to Warfield Affd. Outlining Binding.
13/ Ex. A
14/ Ex. B.
15/ Ex. C
16/ Ex. 4
17/ Project Mainstream stems from 42 USC §2769c(c) which reads: "Programs approved under this part shall, to the maximum extent feasible, contribute to the elimination of artificial barriers to employment and occupational advancements."

City part of the project is for recreation in East Harlem and federal funds are used for administrative support, rent and the provision of coaches and referees. O.E.O. made the grant conditional upon acceptance of a condition barring sex discrimination.

Of the total received by the Foundation under the Mainstream project, $152,465 goes to National, and $196,535 is paid to a consulting organization known as Together, Inc. The remaining $225,000 is earmarked for "seed" grants for local organizations. The plaintiff Local has received a grant of $4,500 under this program, one-half of which has already been paid. Project Mainstream funds are available only to Jaycee Chapters in partnership with a community action agency.18/

The Foundation has also solicited Local's involvement in another federally funded program called Project Uplift. Uplift was granted $650,000 from the O.E.O. to sponsor self-help programs.19/

Together, Inc. has its consulting arrangement with the Foundation.20/ It coordinates

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18/ Washington, member of the National Coordinating Council of Project Mainstream, Tr. 24-25.

19/ Exh. A to Warfield Affd. Outlining Funding.

20/ Ex. 5.

and supervises Project Mainstream, and renders periodic reports to the Government, National and the Foundation. 21/ Its National Advisory Council selects local Jaycee Chapters and community action agencies for awards of seed grants. 22/ Four of the sixteen members of the Council are selected by National. Four of the sixteen members represent U.S. Government Departments and Agencies. 23/

The Criminal Justice Program relates to the rehabilitation of former prisoners. The other projects are explained by their names. In addition to the earmarked community programs, National's budget is used to sponsor internal leadership programs and chapter development programs.

National is a tax-exempt organization.

National maintains no offices in New York. Its officers visit New York periodically, two or three times a year, at the Local's invitation. National has a Regional Staff Officer located in Malboro, Massachusetts, who comes to New York up to ten times a year. 24/

21/ Washington Tr. 32-36.
22/ Washington Tr. 24-25.
23/ Pl. Ex. 3.
24/ Roper Tr. at 79.

II

Jurisdiction over the Person

National has moved to quash the service of process on the ground of lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2). Local asserts in personam jurisdiction under N.Y.C.P.L.R. §301 and under New York's long arm statute N.Y.C.P.L.R. §302, prescribed by Fed. R. Civ. P. 4(e). See Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2 Cir. 1964).

N.Y.C.P.L.R. §301. This provision preserves to New York courts "such jurisdiction over persons . . . as might have been exercised heretofore." Prior to its enactment, foreign corporations were held subject to personal jurisdiction only if they were found to be "doing business" in New York. Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917). New York continues to adhere to the traditional "doing business" test for jurisdiction over foreign corporations when the cause of action does not arise out of acts done in New York. W. Lowenthal Co. Inc. v. Colonial Woolen Mills, Inc., 38 A.D.2d 775 (3d Dept. 1972).

The pertinent facts have already been related. Together, they constitute "doing business" in New York under existing authority.

In B.K. Bruce Lodge, Inc. v. Sub-committee of Management of the Grand Order of Odd Fellows in America, 208 App. Div. 100 (1st Dept. 1924), the Court held that a fraternal benefit corporation which "enforces its policies, decrees and orders incidental to its management, and collects dues through the instrumentality of the defendant District Grant Lodge No. 2" is "doing business within the State of New York."

Judge Botein in People v. Jewish Consumptives' Relief Society, 196 Misc. 579, 581 (Sup. Ct. N.Y. Co. 1949), reaffirmed the validity of the Bruce Lodge holding. He noted that "Numerous cases have pinpricked the areas of 'doing business' as applied to stock corporations engaged in commerce. The relatively few cases relating to nonprofit membership corporations do not delineate similar areas in such detail. But the common denominator for the 'business' of both types of corporation would seem to be the statutory definition, namely 'the activities for which the corporation shall have been organized.' And on that basis most of the norms prescribed for doing business by commercial corporations appear to apply with equal validity to nonprofit corporations." There, the Attorney General had sought to enjoin the Colorado based Relief Society from soliciting funds in New York. Judge Botein wrote, "Clearly the extensive local activities of the defendant assume the

share of doing business in this State." (Id.). National receives dues from the New York Chapter and solicits participation on projects such as Mainstream with the New York Chapter.25/ It awards "seed" subgrants for its projects to combat alcoholism for execution by the New York Chapter. It enforces its membership policies and decrees incidental to its management to insure that no women can join. And these activities have been carried on with continuity over at least the past 20 years. See Doherty v. Moreschi, 187 Misc. 175, 177 (Sup. Ct. N.Y. Co. 1946). ("The defendant International Union is engaged in business within this state. . . . Although not primarily organized for profit, the International carries on, within this state, with reasonable continuity, the activities which it was organized to perform.") To paraphrase, Frummar v. Hilton Hotels International, Inc., 19 N.Y. 2d 533, 537 (1967), the "pivotal question" is whether Local does all the business the National could do were

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25/ The officers of the National in their capacity as trustees for the Foundation have also solicited the Local's participation in Uplift.

the National here by its own officials. 26/

The motion to dismiss under Rule 12(b)(2) is denied.

III

Jurisdiction over the Subject Matter

The complaint alleges subject-matter jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1981. It further alleges that the action arises under the Fifth and Fourteenth Amendments to the United States Constitution and bases jurisdiction on 28 U.S.C. §1331 and §1343, alleging the requisite jurisdictional amount. It also alleges jurisdiction under 42 U.S.C. §2000(d), 42 U.S.C. §1933 and under the N.Y. State Executive Law.

26/ An agency relationship, in another context, has been imputed between International and Local Unions when the Local's membership is controlled by the International. Allen v. International Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, 338 F.2d 309 (5 Cir. 1964).

Jurisdiction is sustained under 28 U.S.C. §1331, as "arising under" the Fifth Amendment, with a finding that the jurisdictional amount is properly alleged. Bell v. Hood, 327 U.S. 678 (1946).

42 U.S.C. §1981 does not apply to sex discrimination. It deals with persons who are denied rights afforded to "white citizens." See League of Academic Women v. Regents of University of California, 343 F. Supp. 636, 638 (N.D. Cal. 1972). 42 U.S.C. §2000(d) in terms bars discrimination but not on the basis of sex, see Joy v. Daniels, 479 F.2d 1236 (4 Cir. 1973).

Actions alleging sex discrimination where state action is concerned may be brought under 42 U.S.C. §1983. Brenden v. Independent School District 742, 342 F. Supp. 1224 (D. Minn. 1972), aff'd, 477 F.2d 1292 (8 Cir. 1973), but since the gravaman of the action here is against federal "governmental action" rather than "state action," jurisdiction may not be based on Section 1983. See District of Columbia v. Carter, 409 U.S. 418, 424-425 (1973).

IV

Preliminary Injunction

The defendant contends, by way of confession and avoidance, that women are allowed to become "associates," in the Jaycees; that women are involved in community action agencies which are partners in Project Mainstream; that they participate in other programs; that female beneficiaries are not discriminated against in the implementation of the grant; that there are women on the Council of Together, Inc; and so on.

No logical reason has been offered, however, why women cannot be full Jaycees members except that the male membership would like to keep it that way. Of course, if the Jaycees are a private organization which does not partake of "government action" and does not perform public functions, that may be its prerogative. 27/

27/ Subject to a possibly evolving doctrine based on tax exemption. See McGlotten v. Connally, 338 F. Supp. 443 (D.C. 1972); and see Jackson v. The Statler Foundation, ___ F.2d ___, Slip Op. No. 46, Sept. Term 1973 (2 Cir. April 5, 1974); but cf. Marker v. Shultz, 485 F.2d 1003 (D.C. Cir. 1973).

The issue is whether the Fifth Amendment applies to the internal membership policies of the Jaycees because of significant Government involvement.

The defendant maintains that there is not "significant Government involvement in the internal membership policies of the Jaycees" and that this commands dismissal of the complaint.

The plaintiff contends that the defendant is subject to constitutional limitations prohibiting discrimination and that it cannot lawfully exclude members or revoke the charters of chapters for failure to adhere to discriminatory policy solely on the basis of sex. The plaintiff relies on three factors: (1) the substantial amount of Government funds administered directly and indirectly by the Jaycees; (2) the quasi-governmental or public function of the organization; and (3) the tax-exempt status of the Jaycees.

The threshold issue is whether sex discrimination in the absence of a constitutional a amendment, may be a violation of the Fifth Amendment. The Supreme Court has decided that irrational discrimination solely on the basis of sex violates the constitutional guarantees of equal protection. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973). We may assume, therefore, that irrational discrimination on the basis of

sex is a violation of the Fifth Amendment if it is the result of action by the Federal Government -- "state action." 28/

The issue then is whether we can find in the decisions on what constitutes "state [government] action" a key that will solve our problem.

We know that the mere receipt of government funds is not enough to make the action of the grantee "state action." Wahba v. New York University, ____F.2d____ Slip Op. No. 353, Sept. Term 1973 (2 Cir. Feb. 11, 1974). If the State (Federal Government) is a "joint participant" in the challenged activity, that may suffice. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). But the existence of a mere regulatory scheme standing alone may not be sufficient if the actor is essentially a private organization. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Yet when the state moves in to regulate the challenged activity

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28/ Though the specific action may be by the federal government rather than by a state, common usage refers to it as "state action." See McGlotten v. Connally, supra, 338 F. Supp. at 455 n. 31; Jackson v. The Statler Foundation, supra, ____ F.2d ____, Slip Op. at 2746 n. 5.

the acts of even a private organization may become "state action." Male v. Crossroads Associates, 469 F.2d 616 (2 Cir. 1972). 29/

We have latterly come to recognize that cases involving racial discrimination are more likely to be found to involve "state action" than cases involving other claims of violation of due process or First Amendment right. See e.g., Wahba, supra, Slip Op. at 1702-03; Jackson v. The Statler Foundation, supra, ____ F.2d at ____, Slip Op. at 2762. 30/

29/ Cf. Norwood v. Harrison, 413 U.S. 455, 463 (1973): "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."

30/ We may conclude that this is the view of the Court of Appeals for the Second Circuit since Judges Moore and Anderson concurred with Judge Friendly in Wahba, supra, and Judges Mansfield and Oakes joined with Judge Smith in Jackson, supra. No judge of the Court has written to the contrary. Judge Mulligan expressed a similar view in Shirley v. State National Bank of Connecticut, ____ F.2d ____, Slip Op. No. 222, Sept. Term 1973 (February 14, 1974).

Whether the emphasis on racial discrimination lies in its historic context as the "prime target of the Fourteenth Amendment," see Coleman v. Wagner College, 429 F.2d 1120, 1127 (2 Cir. 1970 - Friendly, J., concurring), or whether it lies in current mores of anti-discrimination is not altogether clear, at least with any degree of unanimity. I prefer to think that the latter emphasis is at least equal to the former, if only as a sign of confidence in the ethos of this generation.

If that be arguably so, should we not gladly acknowledge that sex discrimination of an arbitrary character is as repugnant as race discrimination of a similar nature? I must concede that this approach is hardly a paradigm of logic, for the essence of state action viewed purely as an activity should hardly depend upon the character of its victims. Since we have accepted the illogic in the racial cases, however, we should accept it in the sex cases as well. We may, accordingly, think of sex as a suspect class not only in the test of what is discrimination but in the tilting of the scale in what constitutes state action.

I find that the congeries of factors here involved make the action of the United

States Jaycees in attempting to revoke the charter of the New York City Chapter "state action" and subject to the jurisdiction of the federal courts.

It is true that one cannot point to a single action of the federal government as the inducing cause of the revocation of the plaintiff's charter. But to paraphrase the language of the Supreme Court in Burton, "in its [contract with U.S. Jaycees] the [Government] could have affirmately required [the Jaycees] to discharge the responsibilities under the [Fifth] Amendment imposed upon the private enterprise as a consequence of state participation. But no State [federal government] may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." 365 U.S. at 725.

I think here the federal government "has so far insinuated itself into a position of interdependence with [National] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth [Fifth] Amendment." Id.

"Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attribu-

ted its true significance." Burton, supra, 365 U.S. at 722.

"[T]he framework of the peculiar facts or circumstances present," 365 U.S. at 726, are:

The Jaycees have changed in recent years from an organization largely devoted to advancement of the personal interest of its members in the business world to an organization largely devoted to good deeds. The U.S. Jaycees' literature emphasizes the role of the local chapters like the plaintiff in these projects. Many of these good deeds are the kinds of activity generally thought of as public functions. A simple recitation makes that evident: control of alcohol abuse, control of venereal disease, economic development, housing and recreation and criminal rehabilitation. In all these areas the Government has admitted civic organizations to partnership in implementing goals set by Congress. The function remains essentially public. The chapters participate in that function, as the literature of National attests. 31/

31/ "Jaycess voluntary manpower and concern for his community makes this program (ex-offender rehabilitation) work." "Jaycees chapters have constructed or are in the process

The funding for these particular public activities is largely governmental. The organization which receives the funds (National or Foundation) is subject to control by an Advisory Council on which sit representatives of four departments of the National Government. " . . . even indirect governmental participation in the management of an organization is persuasive evidence of the existence of state action where that participation is both substantial and other than neutral." Jackson v. The Statler Foundation, supra, Slip Op. at 2761.

Whether the federal funds are awarded by contract or grant, the federal government can and has imposed conditions on the grantee. Thus the O.E.O. grant has a condition prohibiting sex discrimination. 32/ On the reasoning of Burton, by failing to enforce as a condition of the grant that the offending by-laws of National be nullified, the Federal Government would appear to the public to have approved discrimination based on sex in connection with the very activities

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of constructing over a quarter of a billion dollars in nonprofit housing." "Your chapter may develop . . . project ideas." "Each chapter should evaluate the needs of the young people in its community, then develop programs around those needs.

32/ Roper Tr. 65

funded in aid of the public function. "Encouragement of discrimination through the appearance of governmental approval may also be sufficient involvement to violate the Constitution." McGlotten v. Connally, supra, 333 F. Supp. at 458. 33/

The tax-exempt feature is only one other element to be considered. It is unnecessary, in view of the other elements that have led to the conclusion that "state action" is involved to rely upon the remand in Jackson v. The Statler Foundation, supra, as precedent for this decision. 34/

33/ The "s mbolic tie with the state" need not be a sheriff's badge or a public building. Powe v. Miles, 407 F.2d 73 at 83 (2 Cir. 1968). The general public knows that the government uses the Jaycees to do some of its work and that they do not permit women to become members.

34/ The defendant cites a recent opinion of the Court of Appeals of the Tenth Circuit, Junior Chamber of Commerce of Rochester, New York, et al. v. The United States Jaycees, ____F.2d____, Slip Op. No. 73-1560 in support of its position. In that case the claim was based largely on the tax-exempt status of the defendant, United States Jaycees. The plaintiffs sought injunctions

The testimony and exhibits establish the likelihood of irreparable injury to Local should the revocation be permitted to become effective. In addition to the obvious loss of prestige by loss of affiliation, it also appears likely that there will be loss of funds for Local to carry out both its internal leadership and management programs, and its community oriented programs. 35/

I find that the plaintiff has met its heavy burden of demonstrating a combination of probable success and possibility of irreparable injury. The balance of hardships also tips in its favor. Stark v. New York

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against government officials to prevent the making of grants for the use of the deprived and needy and to void the tax-exempt status of the United States Jaycees. Here the only relief sought is an injunction against the revocation of plaintiff's charter. To the extent that the opinion may be said to be a ruling on "state action," however, I note that the facts in that record are not clearly set forth. Moreover, if the record in the District Court in Oklahoma is substantially the same as that in this Court, then I must respectfully disagree with that part of the opinion.

35/ Warfield Tr. 9-12; Washington Tr. 37,40; Roper Tr. 66-67.

Stock Exchange, Inc., 466 F.2d 743, 744 (2 Cir. 1972).

The foregoing shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

The motion to quash is denied. The motion for a preliminary injunction is granted.

It is so ordered.

June 13, 1974

_____

U.S.D.J.

No. 73-2025 & No. 73-2028

SEP 9 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC.; JANIS GAINES, individually, and on behalf of all other persons similarly situated; JANE SELMAN, individually, and on behalf of all other persons similarly situated; CHARLES WETMORE, individually, and on behalf of all other persons similarly situated; JAMES T. BRUEN, individually, and on behalf of all other persons similarly situated; DAVID HEILIGMAN, individually, and on behalf of all other persons similarly situated; THOMAS BANASZEWSKI, individually, and on behalf of all other persons similarly situated; JOANN CLEVENGER, individually, and on behalf of all other persons similarly situated; SYDNEE SCHWARTZ, individually, and on behalf of all other persons similarly situated,

Petitioners,

v.

THE UNITED STATES JAYCEES; THE NEW YORK STATE JAYCEES; THE UNITED STATES JAYCEES FOUNDATION; THE JAYCEE MENTAL HEALTH AND MENTAL RETARDATION FUND; THE JAYCEES WAR MEMORIAL FUND; GEORGE P. SHULTZ, as Secretary of the Treasury of the United States, DON ALEXANDER, as Commissioner of the Internal Revenue; THE INTERNAL REVENUE SERVICE OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity; JAMES LYNN, as Secretary of the Department of Housing and Urban Development; PETER J. BRENNAN, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

(Over)

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

No. 73-2028

THE JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA.; THOMAS S. RITTENHOUSE; BEVERLY LYNN BENSON; MARGARET M. HIPPLE; ROBERTA M. SCHNEIDER,

Petitioners,

v.

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Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1974

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitions of the Junior Chambers of Commerce of Philadelphia and Rochester, and of the individual members of those organizations, set out the opinion below, the jurisdiction of this Court, and the constitutional and statutory provisions involved. (Rochester Petition 2-3; Philadelphia Petition 2.)

QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in holding that the internal membership policies of a private organization, the Jaycees, formulated and enforced free of any government involvement, are not subject to the equal protection constraints of the fifth amendment upon mere receipt by that organization of federal tax benefits, grants and contracts?

COUNTERSTATEMENT OF THE CASE

A. Procedural History

On October 12, 1972, petitioners brought suit in the United States District Court for the District of Columbia against the United States Jaycees ("Jaycees"), the New York State Jaycees, the United States Jaycees Foundation ("Foundation"), the Jaycees Mental Health and Mental Retardation Fund, the Jaycees War Memorial Fund, and several federal officers and agencies. Petitioners' complaint challenged the Jaycees' policy, contained in its constitution and by-laws, of limiting membership to males. It sought a declaration that the Jaycees' membership policy violates the Constitution, an injunction requiring the Jaycees to restore the Rochester

chapter to membership, compensatory and punitive damages, attorneys' fees and court costs. With respect to the government parties, the suit asked for injunctive relief requiring the rescission of any tax exemptions, federal contracts or grants presently enjoyed by any organization which limits membership to males, including the Jaycees parties, and prohibiting any future tax exemptions, grants or contracts for such organizations. The convening of a three-judge court was also requested.

On February 7, 1973, pursuant to a directive of the United States Court of Appeals for the District of Columbia Circuit, the United States District Court for the District of Columbia transferred the case to the Northern District of Oklahoma. On April 9, 1973, the Jaycees parties answered the complaint, and on April 12, 1973, the government parties filed a motion to dismiss.

The United States District Court for the Northern District of Oklahoma, on May 4, 1973, ordered an evidentiary hearing for June 13, 1973, to consider the motion to dismiss, the convening of a three-judge court, the maintenance of the suit as a class action and other specified issues.[1] At that hearing petitioners presented oral testimony and introduced approximately one thousand pages of documentary evidence. The court heard argument from all parties.

On June 26, 1973, the district court filed its opinion dismissing the complaints of the original and interven-

[1] On May 24, 1973, twenty days after the hearing had been scheduled for June 13, 1973, and eight months after initiating this litigation, petitioners filed their first discovery requests and asked that the time for response be shortened in light of the scheduled hearing date. Over the objections of the Jaycees parties, the request to shorten the time was granted.

ing plaintiffs.[2] Petitioners then appealed to the United States Court of Appeals for the Tenth Circuit. On April 16, 1974, the Tenth Circuit affirmed the decision and order of the District Court.

B. Statement of Facts

The material facts are simple and undisputed:

1. The Jaycees respondents are civic organizations which are exempt from income taxation pursuant to Section 501(c)(4) of the Internal Revenue Code. The autonomously functioning Foundation is exempt from federal taxation by reason of Section 501(c)(3) of the Internal Revenue Code.

2. The Jaycees holds grants and contracts from agencies of the federal government which provide funds specifically earmarked for defined projects and expressly limit the use of the funds to such projects.

3. The Jaycees limits membership to males.

4. The affiliation of the Rochester and Philadelphia chapters was terminated because each determined that it would not abide by the Jaycees' policy of limiting membership to males.

5. The government does not dictate, influence or review the internal membership policies of the Jaycees.

6. There is no discrimination on the basis of sex or any other characteristic among beneficiaries of the projects funded by the government.

C. Decisions of the District Court and Court of Appeals

These facts were before the district court and the Tenth Circuit when each held that the necessary connec-

[2] In July 1972 the Philadelphia Junior Chamber of Commerce admitted women to its organization. After notice from the Jaycees that it was in jeopardy of being expelled, the Philadelphia chapter and several of its members sought and received permission to be added as plaintiffs to this action.

tion between the federal funds and the internal membership policies of the Jaycees had not been established and, accordingly, that the state action doctrine was inapplicable to petitioners' allegations. Both courts specifically held that petitioners had failed to allege or prove any government involvement in the internal workings of the Jaycees, including the organization's membership policies, or any discrimination by the Jaycees in the distribution of federal funds among beneficiaries of the programs.

In affirming the district court's dismissal of the complaint, the Court of Appeals stated:

> We fail to see that there is present the essential state action . . . . The plaintiffs would have us rule that because the Jaycees are *used* by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a § 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree. (Rochester Petition A-8; Philadelphia Petition 9a.)

The court concluded that:

> The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement essential to a civil rights action under § 1983. (Rochester Petition A-9; Philadelphia Petition 10a.)

In analyzing petitioners' allegations of federal involvement, through tax benefits, grants and contracts, in the internal membership policies of the Jaycees, the appellate

court concluded that a causal connection did not exist between the internal activities of the Jaycees and the government which would require the application of constitutional standards to otherwise private conduct.

> . . .[T]he question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action. (Rochester Petition A-11-A-12; Philadelphia Petition 12a.)

REASON FOR DENYING THE WRIT

This case does not present a novel construction of the fifth amendment. Petitioners merely seek to have this Court review the Tenth Circuit's affirmance of the district court's determination that the *facts* alleged and proved by petitioners are insufficient to establish a causal link between the complained of private activity and the government. Review of that essentially factual determination, absent a substantial federal question as to the applicable law, is inappropriate for certiorari.

The district court reviewed petitioners' extensive evidence in considering whether a nexus existed between the federal contracts, grants and tax benefits and the challenged Jaycees' membership policies. On the basis of the record before it, the district court properly concluded that such a connection had neither been alleged nor proved. The Tenth Circuit affirmed that decision.

The decision of the Court of Appeals is in full accord with the decisions of this Court. *Moose Lodge No. 107* v.

Irvis, 407 U.S. 163 (1972);[3] *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664 (1970).[4] The Court of Appeals correctly concluded that petitioners had failed to state a claim under 42 U.S.C. § 1983 or the Constitution.

Restrictive membership policies in private associations, even where such policies are drawn with reference to race, are not subject to constitutional strictures unless a "nexus" exists between those restrictive policies and substantial government involvement. *Irvis*, *supra*.[5] This is not a case in which property of the government, or property dedicated or committed to a public use, is employed to promote a plan of invidious discrimination. *See Gilmore* v. *City of Montgomery*, 42 U.S.L.W. 4920 (U.S. June 17, 1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The Jaycees is merely a conduit for federal funds. Here petitioners do not allege that intended beneficiaries of the projects funded by the government are discriminated against. Rather, petitioners'

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[3] In *Irvis* this Court held that the goevrnment must be "significantly involved itself with invidious discriminations" before there is a constitutional violation. 407 U.S. at 173.

[4] In *Walz* this Court stated:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." 397 U.S. at 675.

[5] Without a "nexus" requirement the "essential dichotomy" between private and government action would have no meaning. *See* Civil Rights Cases, 109 U.S. 3 (1883). Moreover, if private organizations in receipt of public funds were required to remake their internal organization in the image of society generally they would be discouraged from participating in publicly useful activities. *See* Wahba v. New York University and Severo, 492 F.2d 96, 102 (2d Cir. 1974).

complaint is that an organization which channels the benefits of these projects to other community organizations and agencies restricts its membership to men. There is no allegation that the government is involved in the Jaycees' internal membership policies. Indeed, the facts before the Court of Appeals and the district court make clear that the government plays no "part in establishing or enforcing the membership . . . policies" of the Jaycees. *Irvis, supra,* at 175.

Moreover, the decision of the Tenth Circuit is fully consistent with the decisions of that Circuit, *Ward* v. *St. Anthony's Hospital*, 476 F.2d 671 (10th Cir. 1973); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969), as well as the decisions of other circuits, *e.g., Fletcher* v. *Rhode Island Hospital Trust & National Bank*, 496 F.2d 927 (1st Cir. 1974); *Jackson* v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), which have held that only where the government involvement has a significant and specific connection with the allegedly unconstitutional conduct under attack will the requisite degree of state involvement be established requiring the invocation of constitutional standards. Where, as here, no such causal relationship has been or can be established, the internal policies of a private organization are immune from constitutional scrutiny. *E.g., Irvis, supra; Fletcher, supra; Jackson, supra; Ward, supra; Browns, supra.*[6]

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[6] While this appeal was pending in the Tenth Circuit, the New York City Jaycees, Inc. brought a similar suit against the United States Jaycees in the District Court for the Southern District of New York. The New York City Jaycees, Inc. v. United States Jaycees, Inc., No. 74 Civ. 652 (June 3, 1974). An appeal from the decision of the district court in that case was noted by the defendants therein on June 28, 1974. The decision of the District Court for the Southern District of New York is in direct conflict with decisions of its own court of appeals. Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). *Cf.* Barrett v. United Hospital, No. 73 Civ. 1716 (S.D.N.Y., May 23, 1974); Mulvihill v. Julva Butterfield Memorial Hospital, 329 F.Supp. 1020 (S.D.N.Y. 1971); Gross-

CONCLUSION

The decision of the Tenth Circuit does not give rise to a substantial question regarding the parameters of the fifth amendment. The decision addresses a factual determination of whether petitioners' allegations and proof of a causal relationship between the government and the internal membership policies of the Jaycees were sufficient to mandate adherence to constitutional requirements. Having reviewed the record developed by petitioners in light of its own decisions and those of this Court, the Tenth Circuit concluded that the allegations before it were insufficient to establish such a nexus. That decision is fully in accord with the opinions of this Court and of other circuits.

Accordingly, the Jaycees respondents submit that the decision of the Tenth Circuit is correct and that the Petitions of the Junior Chamber of Commerce of Rochester and Philadelphia should be denied.

Respectfully submitted,

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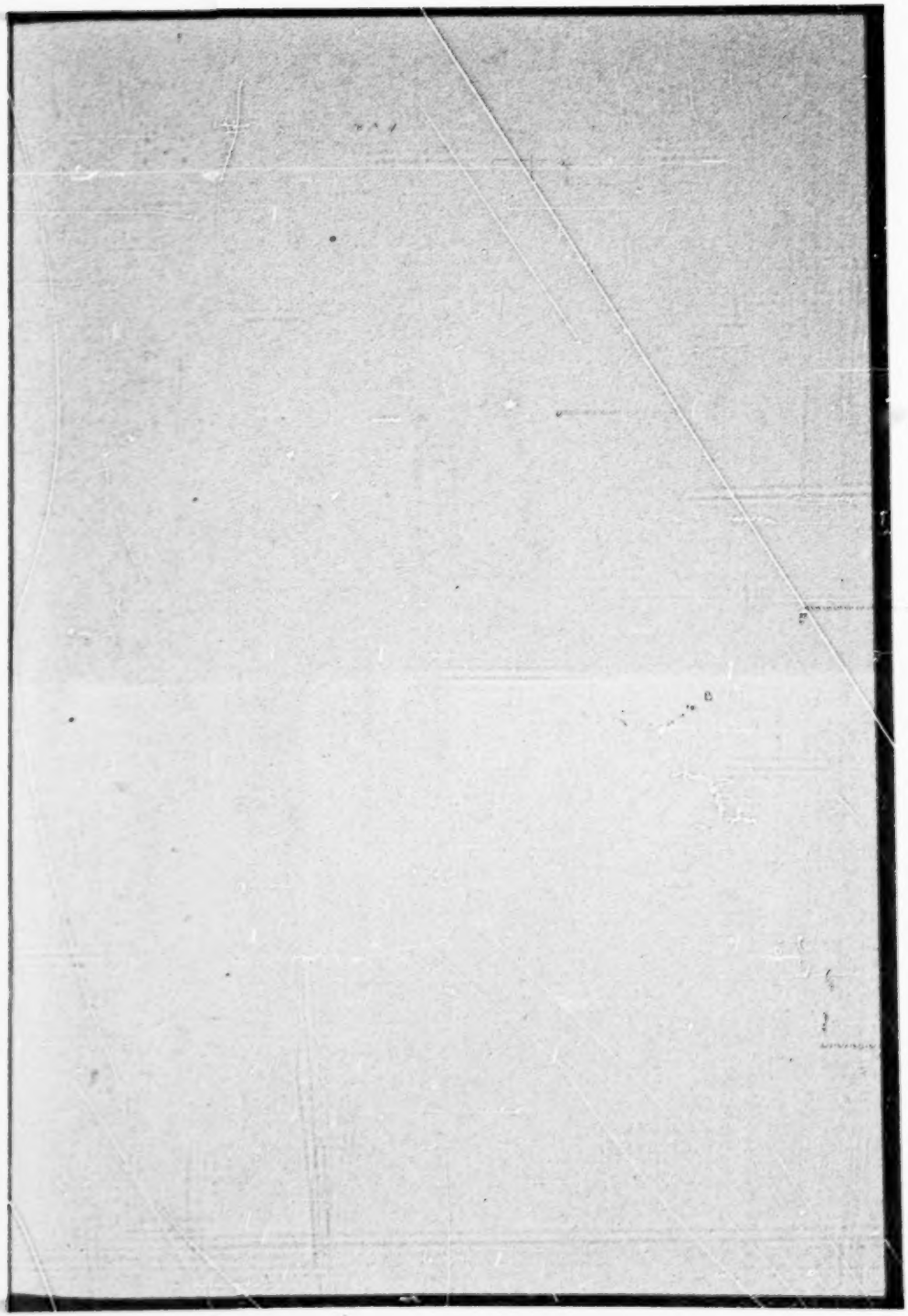
ner v. Trustees of Columbia University, 287 F.Supp. 535, 547-48 (S.D.N.Y. 1968). A conflict of a district court decision with decisions of its own or other courts of appeal is not, however, despite petitioners' veiled suggestion to the contrary, a basis for granting a writ of certiorari.



In the Supreme Court of the United States

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v.

THE UNITED STATES JAYCEES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners brought this action against the United States Jaycees, certain state and local Jaycee organizations and foundations,[1] and seven federal

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[1]In addition to the United States Jaycees, the private defendants include the New York State Jaycees, the Pennsylvania State Jaycees, the Louisiana Junior Chamber of Commerce, Inc., the Downtown Chapter of the District of Columbia Jaycees, Maine State Jaycees, Junior Chamber of Commerce of Orrington, Inc., the United States Jaycees Foundation, the Jaycees Mental Health and Mental Retardation Fund and the Jaycees War Memorial Fund.

officials and agenices.[2] They alleged that the Jaycees' exclusion of women from membership constituted unconstitutional sex discrimination by state action, on the ground that the Jaycees are closely related to government regulation and funding. More particularly, petitioners contended that by granting tax exempt status to the Jaycee organizations (and their associated foundations), the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service have endorsed and subsidized the Jaycees' discriminatory membership policy. Petitioners assert similar arguments against the Secretary of Labor, the Secretary of Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Director of the Office of Economic Opportunity, who have allowed the Jaycees to participate in the administration of various federally-funded programs.

Petitioners sought injunctive relief to require the termination of tax-exempt status of any organization whose membership discriminates on the basis of sex and the termination of any federal grants or programs which are administered through sex-segregated organizations. The district court granted the government's motion to

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[2]The federal defendants are the Secretary of the Treasury, the Internal Revenue Service, the Commissioner of Internal Revenue, the Secretary of Housing and Urban Development, the Secretary of Labor, the Director of the Office of Economic Opportunity and the Administrator of the Environmental Protection Agency.

dismiss,[1] and the court of appeals affirmed. While the court of appeals indicated that federal jurisdiction was questionable (Pet. No. 73-2025, p. A-7), its affirmance was based upon its determination that the discrimination complained of did not involve state or federal action (Pet. No. 73-2025, pp. A-8 to A-12).

1. The decision below that the challenged discrimination did not constitute state action accords with *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163. There, the Court stated (p. 173) that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' * * * in order for the discriminatory action to fall within the ambit of the constitutional prohibition." Here, as the court of appeals concluded (Pet. No. 73-2028, pp. 10a-12a), there is no significant government involvement with the Jaycees membership policy.

The United States Jaycees ("Jaycees") is a nonprofit, civic-oriented organization, with affiliated state and local chapters. They are exempt from federal income taxation as "civic organizations" under Section 501(c)(4) of the Internal Revenue Code of 1954, while the three private foundations established by the Jaycees, which were joined as defendants, are exempt as charitable organizations under Section 501(c)(3). This federal tax-exempt status does not, standing alone, constitute significant government involvement in the Jaycees' exclusionary membership policy within the meaning of the *Moose Lodge* case. Indeed, as the Court observed in *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676, a tax exemption does not constitute government "sponsorship" but rather creates

[1]The government had moved to dismiss on the grounds that (1) the suit was barred by sovereign immunity, and (2) the complaint failed to state a claim upon which relief might be granted. In sustaining the government's motion to dismiss, the district court did not indicate whether it was relying on the jurisdictional ground raised by the government or the failure to state a claim. With respect to the private defendants, however, it expressly dismissed for failure to state a claim (Pet. No. 73-2025, pp. B-3 to B-4).

"only a minimal and remote involvement." Accord: *Marker* v. *Shultz*, 485 F. 2d 1003 (C.A.D.C.); *Browns* v. *Mitchell*, 409 F. 2d 593 (C.A. 10); *Bright* v. *Isenbarger*, 314 F. Supp. 1382 (N.D. Ind.), affirmed, 445 F. 2d 412 (C.A. 7); *Blackburn* v. *Fisk University*, 443 F. 2d 121 (C.A. 6); *McCoy* v. *Shultz*, 31 A.F.T.R. 2d 858 (D.D.C., decided February 13, 1973).[4]

Similarly, the Jaycees' participation in the administration of various federal grants and public assistance programs[5] does not rise to the level of governmental involvement in the exclusionary membership policy attacked by petitioners. With respect to such federal grants or contracts, the Jaycees act only as a conduit through which the federal programs are implemented on a local level. In contrast to the textbook grant to racially-segregated schools struck down in *Norwood* v. *Harrison*, 413 U.S. 455, and the racially-discriminatory policy of a restaurant located in a publicly-owned building held unconstitutional in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, the federal grants here do not benefit the Jaycees but on the ultimate recipients of the funds.

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[4]In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit* v. *Green*, 404 U.S. 997, the Section 501(c)(3) exemption of segregated private schools was successfully challenged. However, *Green* was not decided on "state action" grounds but on the basis of the meaning of the term "charitable" as used in Sections 170(c) and 501(c)(3) of the Code.

[5]For example, petitioners refer (Pet. No. 73-2025, pp. 7-8; Pet. No. 73-2028, p. 3) to grants and contracts awarded the Jaycees by the Department of Health, Education, and Welfare, the Office of Economic Opportunity, the Department of Housing and Urban Development and the Department of Labor. The programs funded by such grants include such diverse civic-oriented activities as counseling Job Corps returnees, criminal justice programs, construction of low-cost housing projects, and public education on such subjects as alcohol abuse, venereal disease, danger of poisons, child abuse, etc.

With one exception,[6] petitioners do not allege that there is any discrimination with respect to the actual administration of these federally-funded programs, insofar as recipients or beneficiaries are concerned. Rather, they urge only that women have been deprived of the leadership training and experience involved in participating with the Jaycees in the administration of such programs.

Contrary to petitioners' argument (Pet. No. 73-2025, pp. 21-22; Pet. No. 73-2028, p. 12), the decision below does not conflict with *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2), as to the federal respondents. *Jackson* held only that the plaintiff had standing to challenge state (and federal) tax exemptions of 13 charitable foundations because of alleged racially-discriminatory policies—a question the decision below did not discuss in dismissing petitioners' suit against the federal respondents. Compare *Cattle Feeders Tax Committee* v. *Shultz*, No. 73-1896 (C.A. 10, decided October 4, 1974), with *Eastern Kentucky Welfare Rights Organization* v. *Simon*, No. 74-1293 (C.A. D.C., decided October 9, 1974). Insofar as the complaint in *Jackson* sought revocation of tax exemptions, the court held that it was deficient on its face for failure to make the New York State Tax Commission and the Secretary of the Treasury parties. The case was remanded for further proceedings to determine whether, under various criteria suggested in the majority opinion, the foundations' affairs were so closely linked to governmental action and support as to

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[6]Petitioners suggest (Pet. No. 73-2025, p. 8) that under the Job Corps program funded by the Department of Labor, the Jaycees counsel only male Job Corps returnees. The record shows, however, that the Job Corps program is designed to assist severely disadvantaged youth of both sexes. While the Jaycee volunteers are asked to assist males, a similar agency called WICS (Women in Community Service) assists the females (Ex. 274).

generate "state action" in their conduct (496 F. 2d at 629).[7] As the majority opinion in *Jackson* noted, its suggested "formulation of [a] definition of 'state action' is applicable only to claims of racial discrimination" (496 F. 2d at 635). At all events, however, there is no reason to believe that the court below applied substantially different criteria here, or that the application of those criteria would lead to a different result in this case.

2. The dismissal of petitioners' action against the federal respondents can also be supported on the alternative ground that petitioners lacked standing to sue these governmental officers and agencies. As this Court has recently reaffirmed, the doctrine of standing requires that the complaining party suffer a concrete injury caused by the action challenged as unlawful. See, *e.g.*, *Schlesinger* v. *Reservists Committee to Stop the War*, No. 72-1188, decided June 25, 1974; *Laird* v. *Tatum*, 408 U.S. 1, 12; *Data Processing Service* v. *Camp*, 397 U.S. 150. While standing may exist where injury and causative action are only tenuously linked (see *United States* v. *SCRAP*, 412 U.S. 669, 686-690), there is no showing that the Jaycees' tax-exempt status and their administration of various federal programs caused or in any manner reinforced their "males only" membership policy, which the petitioners assert has

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[7] Judge Friendly, joined by Judges Hays and Mulligan, filed an extensive opinion dissenting from the court's denial of a motion for reconsideration *en banc*. That opinion emphasized the distinction between seeking relief against governmental involvement and relief against the foundations themselves. Judge Feinberg also dissented.

injured them. Indeed, the relief sought by petitioners against the federal respondents would not necessarily result in the admission of women to the Jaycees.

Those petitioners who are taxpayers also lacked standing to sue as such, since they failed to establish the required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102; *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*; *United States* v. *Richardson*, No. 72-885, decided June 25, 1974. Petitioners' challenge was not addressed to the taxing and spending power of Article I, Section 8 of the Constitution and petitioners have made no claim with respect to the federal grants that the funds were being spent in violation of a "specific constitutional limitation upon the * * * taxing and spending power * * * " (392 U.S. at 104). Moreover, the real purpose of their suit is not to reduce federal expenditures or increase revenues, but to change the Jaycee membership policies.

Finally, to the extent that petitioners sought injunctive and declaratory relief against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service concerning the tax-exempt status of the Jaycee organizations, the suit is barred by the Anti-Injunction Act (Section 7421 of the Internal Revenue Code) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201). Those two provisions respectively prohibit suits "for the purpose of restraining the assessment or collection of any tax" or declaratory suits "with respect to Federal taxes." Compare *Bob Jones University* v. *Simon*, No. 72-1470 and *Alexander* v. *"Americans United" Inc.*, No. 72-1371, both decided May 15, 1974.

For the reasons stated, the petitions for writs of certiorari should be denied with respect to the federal respondents.

Respectfully submitted.

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